



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-178902

November 12, 1973

40177

AIRMAIL

Jensen and Harris
Attorneys at Law
1029 West Third Avenue
Anchorage, Alaska 99501

Attention: Jeffrey H. Roth, Esq.

Gentlemen:

Reference is made to your telefax message dated June 27, 1973, and subsequent correspondence, protesting on behalf of Red J, Inc., against the award of a contract to any other bidder under invitation for bids (IPB) No. DAFA03-73-B-0107, issued at Fort Richardson, Alaska.

The invitation in question requested bids to be submitted in Building 977, Room 114 by 1:30 p.m. on May 25, 1973. The invitation further stated that the procurement was to be a 100-percent set-aside for small business. Six bids were received under schedule A of the solicitation and five were received under schedule B. On the day of bid opening, one of the bidders, Jet Services, Inc., sent a telegraphic modification of their bid, increasing the prompt payment discount of 10 percent to 17 percent, to the procuring agency. The telegram was received at 7:10 a.m. at the telegraph office in Alaska. The telegraph office then communicated the contents of the telegram to procurement personnel at the installation, the message being received and recorded at 9:45 a.m. However, the telegraphic message was neither placed in a sealed envelope nor forwarded to the proper room where bid opening was to occur later that day.

That afternoon, while bids were in the process of being opened, Miss Achison, the recipient of the message, noticed that it was still on her desk and not in the bid room. The message was then delivered to the bid room and publicly announced. The effect of the telegram was to reduce Jet Services' high bid to a lower position (lower than Red J, Inc., but still above other bidders which were later disqualified for various reasons).

[Protest Against Bid Modification]

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It is your contention that the modification should not have been considered. You acknowledge that Standard Form 33A, paragraph 5(b) allows bids to be modified by telegraphic notice, but you assert that this section further provides that such modifications must be received prior to the hour and date specified for receipt. You claim that there is no proof that the modification arrived before bid opening began or that it was properly sealed and recorded by the recipient of the telegram. As these procedures were not properly followed, you contend that consideration of the bid of Jet Services, including the telegraphic modification, is unlawful.

Your second contention is that the recipients of the awards under both schedules A and B were not small businesses and, therefore, not eligible for award. You, therefore, requested a determination from the Small Business Administration (SBA) Size Appeals Board as to the size of H. C. & E. Service and Support Company of Security, Colorado, and Jet Services, Inc., of Jacksonville, Florida.

Replying to your second contention first, the SBA Size Appeals Board found both of the above companies to be small businesses for this procurement as defined by the Small Business Rules and Regulations. These determinations were made on June 16, 1973, and July 23, 1973, respectively.

As we stated in our decision B-166633, July 2, 1969:

"Under 15 U.S.C. 637(b)(6), a decision of the SBA regarding the size status of a particular concern is conclusive upon the procurement agency involved. 46 Comp. Gen. 898, 900 (1967); 44 *id.* 271, 273 (1964). Moreover, as we stated in B-150757, April 8, 1963: 'Neither our Office nor any executive agency of the Government may ignore a determination by SBA as to the size status of a particular concern.' Cf. American Electric Company, Ltd. v. United States, 270 F. Supp. 659 (1967); Springfield White Castle Company v. Eugene P. Foley, 220 F. Supp. 77 (1964)."

Accordingly, since the decision of SBA regarding the size status of a company, by statute, is "conclusive," we have no alternative but to deny this aspect of your protest. See also B-173533, October 12, 1971.

As regards your initial contention, the procedural rules for modification of bids are governed by paragraph 8 of the Solicitation Instructions and Conditions which states in pertinent part:

"LATE OFFERS AND MODIFICATIONS OR WITHDRAWALS.

"(a) Offers and modifications of offers * * * received at the office designated in the solicitation after the exact hour and date specified for receipt will not be considered unless: * * * (3) if submitted by mail (or telegram if authorized) it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; provided, that timely receipt at such installation is established upon examination of an appropriate date or time stamp (if any) of such installation, or of other documentary evidence of receipt (if readily available) within the control of such installation or of the post office serving it. * * *" (Underlining supplied.)

As it appears from the record, the late receipt of Jet Services, Inc., modification was due solely to mishandling by the Government officials at the installation after receipt of the telegram at said installation. The message arrived at Fort Richardson almost a full 4 hours before bid opening. Had the message received the proper attention, it most certainly would have made its way into the bid room by the time set for bid opening. Therefore, the modification should have been considered if there was proper evidence to establish its time of arrival at the fort.

Standards of evidence to establish time of receipt are set out in ASFR 2-201 (a), section C(xxxvi)(c) which provides that:

"(c) The only acceptable evidence to establish:

"(1) the date of mailing of a late bid, modification or withdrawal sent either by registered or certified mail is the U. S. Postal Service postmark on the wrapper or on the original receipt from the U. S. Postal Service. If neither postmark shows a legible date, the bid, modification or withdrawal shall be deemed to have been mailed late.

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"(11) The time of receipt at the Government installation is the time/date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained by the installation." (Underlining supplied.)

In this particular case, the time of receipt was noted upon the memorandum of the telephonic message as given by the telegraph company. This was the normal procedure used by the procurement personnel to document the time of receipt of such a telegram. It is our opinion that such a memorandum, with the proper notation of time of receipt, is adequate "other documentary evidence" to meet the requirements of acceptable evidence under the above-quoted provision. Therefore, as the modification was received before the time of bid opening but delayed solely due to Government mishandling, and there is sufficient evidence to prove the time of its receipt, the agency action in considering the modification was proper.

In view of the foregoing, our Office finds no basis to challenge either of the awards under the IFB, as both companies are small businesses and the modification of the Jet Services bid was properly considered.

Accordingly, your protest is denied.

Sincerely yours,

Paul G. Domblick

For the Comptroller General
of the United States